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No. 90-433

In the Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES W. BUTLER, PETITIONER

v.

RICHARD THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Rehabilitation Act of 1973 (29 U.S.C. 791(b)) or FBI policies or procedures promulgated thereunder precluded the discharge of an alcoholic FBI Special Agent based on four alcohol-related incidents—the agent's assaults against a crippled person and a security guard, his destruction of his automobile by driving it into a wall, and his misplacing of his vehicle.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 900 F.2d 871 (5th Cir. 1990). The opinion of the district court (Pet. App. 1b-3b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1990. On July 19, 1990, Justice White granted an extension of time within which to file a petition for certiorari to and including September 12, 1990. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an alcoholic, was employed with the Federal Bureau of Investigation as a Special Agent from 1973 until his dismissal in 1987. His duties as Special Agent included conducting surveillances, undertaking investigations, testifying in federal court, making arrests, collecting evidence, conducting counter-intelligence activities, carrying and using firearms, using physical force, and driving an automobile. Pet. App. 1a.

Petitioner's alcoholism did not interfere with his job performance in his first five years as a Special Agent. In 1978, however, petitioner assaulted a crippled gas station attendant while intoxicated. A few months later, again intoxicated, he assaulted a security guard, whom he physically injured. While on probation as a result of the second incident, petitioner obtained treatment. No further incidents occurred for approximately five years when, in 1983, again under the influence of alcohol, petitioner drove his FBI vehicle into a wall, wrecking both the wall and the car. Pet. App. 22a. He was reprimanded, again placed on probation, and warned that any further incident could and would result in his discharge. Petitioner again sought treatment. Finally, in February 1987, petitioner became so drunk that he could not remember where he had left his FBI vehicle; it was not recovered for several days. Petitioner then checked himself into an in-patient alcohol rehabilitation facility. After petitioner completed the program, a facility representative notified the FBI that petitioner's "prognosis will be excellent for recovery and prolonged abstinence." *Ibid.*

In June 1987, the Bureau notified petitioner that it was considering dismissing him because of the

repeated alcohol-related incidents. Petitioner requested reconsideration based on his favorable prognosis and abstinence, but in November 1987 he was dismissed. Pet. App. 2a.

2. After exhausting his administrative remedies, petitioner filed suit in federal district court, claiming that his dismissal violated the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. 791(b), the Due Process Clause of the Fifth Amendment, and the Bureau's own regulations. The district court rejected all of these claims.[1] Pet. App. 1b-3b. It held that the policies and procedures of the Bureau's alcoholism program did not prevent his dismissal because "[t]he language used * * * regarding the implementation of the program is precatory." *Id.* at 1b (citing Manual of Administrative Operations and Procedures, Pt. I, § 15, at subpt. 3.2.1 ("employee should be given a firm choice")). On the statutory claim, the court found that there were "at least four occasions" where petitioner "engaged in serious improper conduct involving injury to both persons and property," and that petitioner's discharge "was not due to his alcoholism, but due to his recurrent misconduct." Pet. App. 2b. It concluded that the FBI had followed correct procedures in terminating petitioner. *Id.* at 3b.

3. The court of appeals affirmed.[2] Pet. App. 1a-10a. Assuming that alcoholism falls within the scope

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[1] Petitioner did not renew his Fifth Amendment claim before the court of appeals, see Pet. App. 2a, and does not raise it before this Court, see Pet. 4 n.1.

[2] Before addressing the Rehabilitation Act claim, the court of appeals first disposed of the parties' arguments under the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (the Hughes Act). The Hughes Act provides that "[n]o person may be denied

of the Rehabilitation Act, *id.* at 6a, the court noted that the protections under Section 791(b) of the Rehabilitation Act, the section which formed the basis for petitioner's claim,[3] apply only to a "qualified handicapped person." A "qualified handicapped person" is defined under the implementing regulations

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or deprived of Federal Civilian employment * * * solely on the ground of prior alcohol abuse or prior alcoholism," 42 U.S.C. 290dd-1(b), but specifically exempts the FBI from its coverage. 42 U.S.C. 290dd-1(b)(2)(A). The FBI had argued that the legislative history of the Hughes Act evidenced an intent to include current alcoholics within its scope, notwithstanding Congress's use of the word "prior" in the statute. Therefore, the Hughes Act's exclusion of the FBI from its coverage indicated that Congress intended to provide no protection to alcoholics within the Bureau.

The court agreed that the Hughes Act covered current alcoholics, Pet. App. 4a, but did not reach the second half of the FBI's argument. Instead, it noted that the Hughes Act does not apply to an employee "who cannot properly function in his employment." 42 U.S.C. 290dd-1(c). It found that the "recurring incidents that precipitated [petitioner's] termination" revealed him to have been dysfunctional when he was fired, Pet. App. 2a-3a, and that "[c]onsequently, the Hughes Act ordains no protection for the kind of problem that [petitioner] exhibited." *Id.* at 4a.

[3] Petitioner chose to sue under Section 791, rather than under the parallel provision of 29 U.S.C. 794. A suit under Section 794 would have had to overcome 29 U.S.C. 706(8)(B), which excludes from the definition of "handicapped individual" for purposes of Sections 793 and 794 one "who is an alcoholic * * * whose current use of alcohol * * * prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." The FBI argued that this limitation should also apply to suits brought under Section 791(b), but the court did not reach this argument because it disposed of the case on other grounds. See Pet. App. 7a.

as one who, "with or without reasonable accommodation, *can perform the essential functions of the position in question without endangering the health and safety of the individual or others.*" Pet. App. 7a-8a (quoting 29 C.F.R. 1613.702(f)) (emphasis the court's); see also 29 C.F.R. 1613.703, 1613.704.

The court held that petitioner's "position as a law enforcement officer means that his alcoholic incidents furnish a sufficient basis for his discharge because he cannot carry on his work safely." Pet. App. 8a. It noted that petitioner "ha[d] not cited a single case to contradict the government's position on this," *ibid.*, distinguishing cases in which the employees' duties did not involve him in activities that "could well pose * * * a threat to the safety of others," *id.* at 8a-9a (citing *Nisperos* v. *Buck*, 720 F. Supp. 1424 (N.D. Cal. 1989) (alcoholic INS attorney may recover under the Act) (in turn distinguishing *Copeland* v. *Philadelphia Police Dep't*, 840 F.2d 1139 (3d Cir. 1988) (police officer with prior drug use may not recover under the Act), cert. denied, 490 U.S. 1004 (1989))). In summarizing its Rehabilitation Act analysis, the court stated that the Act "offers no protection to [petitioner] because he has shown himself incapable of safely performing his duties, even the simplest of which—carrying a loaded firearm—is a demanding and dangerous one." Pet. App. 9a.

The court also rejected petitioner's contention that the FBI's internal rules entitled him to a "firm choice" before being dismissed. Noting that "[t]he issue here is whether the FBI regulations are mandatory or precatory," Pet. App. 9a, the court "concur[red] fully in the [district court's] reasoning" that the FBI regulation was precatory. *Id.* at 10a. The court further noted that even if the regulations were mandatory, "they would not have afforded [pe-

titioner] a firm choice because he was not a 'self referral' and only 'self referrals' are accorded any form of job security." *Ibid.*

ARGUMENT

The regulations promulgated by the Equal Employment Opportunity Commission to implement Section 791(b) of the Rehabilitation Act—which petitioner does not challenge—protect only employees who can perform the essential functions of their position "without endangering the health and safety of [themselves] or others." 29 C.F.R. 1613.702(f).[4] Petitioner does not deny that he assaulted individuals on two separate occasions, that he wrecked his car, or that he "misplaced" his vehicle while intoxicated. Given this record of reckless conduct—including two unsuccessful attempts at abstinence after receiving treatment—the FBI and the lower courts were justified in finding that petitioner could not safely carry a firearm, drive a car, or make arrests without endangering himself or others. Given those factual conclusions, the Act did not apply. No decision of this Court, or of any court of appeals, suggests otherwise.

1. Petitioner mischaracterizes the court of appeals' decision as broadly holding that federal law enforcement officers, "almost 35,000 employees," *per se* do not enjoy any protection under the Rehabilitation Act. Pet. 6. In fact, the court of appeals concluded

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[4] Section 791(b) does not explicitly create a cause of action. In 1978, Congress amended the Rehabilitation Act to provide that suits brought under Section 791(b) should have the same "remedies, procedures, and rights" as suits under Title VII of the Civil Rights Act of 1964. See 29 U.S.C. 794a; *Prewitt* v. *United States Postal Service*, 662 F.2d 292, 301-304 (5th Cir. 1981).

only that the FBI validly dismissed this particular employee after he engaged in repeated acts of misconduct that constituted a threat to himself and others while on the job. The Rehabilitation Act affords petitioner no protection because he has shown himself unable to perform his job safely, not because he is a law enforcement officer. The court of appeals' opinion in no way speaks generally to other employees with handicaps among the ranks of federal law enforcement personnel who do not have petitioner's striking record of dangerous misconduct.[5]

2. Petitioner claims that the Fifth Circuit's result here is inconsistent with three court of appeals decisions interpreting the Rehabilitation Act, which he argues require the FBI to afford employees a "firm choice" between seeking treatment and discipline before dismissing them. See Pet. 10 (citing *Rodgers* v. *Lehman*, 869 F.2d 253 (4th Cir. 1989); *Crewe* v. *United States Office of Personnel Management*, 834 F.2d 140 (8th Cir. 1987); *Whitlock* v. *Donovan*, 790 F.2d 964 (D.C. Cir. 1986), aff'g 598 F. Supp. 126 (D.D.C. 1984)).[6] In fact, none of those cases dealt with the issue involved here—whether the employee could "perform the essential functions of the posi-

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[5] In a similar vein, petitioner contends that excluding those who are a danger to themselves and others from the Act's coverage "extends the protection of the statute only to those who do not need it." Pet. 12. This is incorrect. Most handicapped employees do not endanger the lives of others while performing their jobs, and they are protected by the Act.

[6] Although petitioner cites *Whitlock* as a court of appeals precedent, Pet. 10, the D.C. Circuit affirmed the district court without a published opinion. See 790 F.2d 964 (1986) (Table). The case therefore does not constitute precedent under that circuit's rules. See D.C. Cir. R. 8(b).

tion in question without endangering the health and safety of the individual or others." 29 C.F.R. 1613.702(f). Because the employees in the cited cases had not engaged in dangerous behavior directly related to one or more of the requirements of the job in question, the only issue was whether the employing agency had fulfilled its duty to make a reasonable accommodation to the employee's alcoholism. See *Rodgers*, 869 F.2d at 254-258 (an employee working in a civilian capacity for the Navy and another working as a boiler plant operator removed for excessive unexcused absences); *Crewe*, 834 F.2d at 141 (alcoholic applicant found unsuitable for office work); see also *Whitlock*, 598 F. Supp. at 128-129 (employee discharged from desk job because of alcohol-related absenteeism).[7]

3. Petitioner next contends that the Fifth Circuit "had no basis from which to conclude that petitioner could not perform his duties as an FBI agent." Pet. 12 (citing *School Board* v. *Arline*, 480 U.S. 273, 287 (1987)). This surprising assertion ignores petitioner's uncontested record of misconduct which formed the basis for the district court's grant of summary judgment. See Pet. App. 2b. Because petitioner does not point to any unresolved factual issue, the district court was not required to conduct a factual inquiry

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[7] The Ninth Circuit has held that there must be a "reasonable probability of substantial harm" before a handicapped applicant can be denied employment in higher-risk jobs. *Mantolete* v. *Bolger*, 767 F.2d 1416, 1422 (1985). The plaintiff in *Mantolete* argued that there was insufficient reason to believe her handicap would result in injury to herself or others because, among other reasons, she had performed a similar job flawlessly for years. 767 F.2d at 1419. Here, petitioner has already shown the danger that the combination of his handicap and job responsibilities poses to others.

before concluding that "[petitioner] engaged in serious improper conduct involving injury to both persons and property," *ibid.*, and therefore that the FBI could reasonably conclude he could not safely discharge his duties as a Special Agent.

4. Finally, nothing warants this Court's review of the court of appeals' finding that the FBI's internal manual was only precatory. The only other court of appeals to address the issue has concluded that a similarly worded manual written by the Office of Personnel Management to implement Section 504 of the Rehabilitation Act (29 U.S.C. 794) is only precatory. See *Judd* v. *Billington*, 863 F.2d 103, 105-106 (D.C. Cir. 1988); cf. *Rodgers* v. *Lehman*, 869 F.2d 253, 258-259 (4th Cir. 1989).

Petitioner also stated that "there is no basis upon which to deny [the FBI Manual's] enforcement" because it "does no more than restate the Rehabilitation Act as it applies to every other executive branch employee." Pet. 14. On petitioner's own characterization, the Manual offers no more protection than that provided under the Rehabilitation Act. For the reasons already stated, that Act affords petitioner no protection in this case. See pp. 6-8, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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